MALAYAN PINEAPPLE COMPANY SDN. BHD., KLANG v. FOOD INDUSTRY EMPLOYEES UNION

[O.C.J. (Mohamed Azmi J.) November 8, 1975]
[Kuala Lumpur — Originating Motion No. 64 of 1974]

Administrative Law — Application to quash award of Industrial Court — Award for payment of retrenchment benefits — Power of Industrial Court — Employment Ordinance, 1955, s. 60G — Industrial Relations Act, 1967, ss. 26 and 27.

Industrial Law — Retrenchment benefits — Power of Industrial Court to award retrenchment benefits — Employment Ordinance, 1955, s. 60G — Industrial Relations Act, 1967, ss. 26 and 27.

In this case an application was made for an order of *certiorari* to quash the award of the Industrial Court which had ordered the payment of retrenchment benefits to the employees of the applicant company. It was argued that the Industrial Court had no power to award retrenchment benefits and therefore it had acted in excess of its jurisdiction.

Held: the Industrial Court had power to award retrenchment benefits and had not acted in excess of its jurisdiction. The application must therefore be dismissed.

ORIGINATING MOTION.

S. Kulasegaran for the applicant.

D. Puthucheary for the respondent.

Mohamed Azmi J.: This is an application by Notice of Motion by the Malayan Pineapple Company Sendirian Berhad, Klang, for an Order of *Certiorari* to remove into this court for the purpose of quashing the award dated June 18, 1974 made by the Industrial Court vide Industrial Court Case No. 17 of 1974 on the following grounds: —

(a) The award is wrong in law.

(b) The Industrial Court is wrong in law in holding that under section 60G of the Employment Ordinance, 1955 the claimants as per Schedule B of the award are entitled to retrenchment benefits.

(c) The Industrial Court has acted in excess of its jurisdiction in ordering that the claimants as per Schedule B of the award be paid retrenchment benefits.

The facts in this case are not in dispute. The claimants are members of the Food Industry Employees Union who are employed by the applicant. Their services were terminated on November 17, 1973 on the ground that the company was closing down. The said company, however, did not pay the claimants any redundancy payments for the service rendered by them to the company, and the union claims on their behalf redundancy payments of 1½ months' wages for each year of service. In its Statement of Reply, the company stated that its business started in 1959 and, except for three years' profit, had been running at a steady loss up to the date of closure in November 1973. Under the circumstances, it was forced to close its factory, with the result that the services of all its employees, except seven, were terminated. It was therefore averred that no redundancy payments were payable in the circumstances.

It is clear from the pleadings that from the time the dispute was referred by the Minister to the Industrial Court up to the time when the award was made, the competency of the Industrial Court to entertain dispute regarding redundancy claims was never challenged. In its award, the court quite correctly held that there were two issues to be decided in the dispute, namely, whether the claimants were entitled to retrenchment benefits and, if they were so entitled, what should be the quantum of such benefits. Having regard to the provision of section 60G of the Employment Ordinance, 1955, the court came to the conclusion that all the claimants were entitled to retrenchment benefits except those who had not been in continuous service with the company for less than three years. On the second issue, the court came to the conclusion that the company was in a financial position to make redundancy payments, and on the evidence before it, the court determined that for those who has worked for three years and over the company should pay them seven days pay for each year of service.

Before me, it is now forcibly argued by counsel for the company that the said award is wrong in law on the ground that the Industrial Court has no power under section 60G of the Employment Ordinance to award retrenchment benefits, and therefore it has acted in excess of its jurisdiction.

Section 60G of the Employment Ordinance, 1955 provides as follows:

"No labourer who has been in continuous service with an employer for less than three years shall be entitled to any retrenchment benefit on the termination of his service by the employer on the ground of redundancy or by reason of any reorganisation of the employer's profession, business trade or work."

By comparing the wordings of the section with other similar provision in the Ordinance, particularly sections 60D, 60E and 60F, pertaining to holidays, annual leave and sick leave, it is argued on behalf of the company that on the literal construction of section 60G there is no obligation on the part of the employer to pay retrenchment benefits to its employees. It is submitted that this section merely provides a qualifying period of making a claim for retrenchment benefits without any obligation to pay, so that when the company closes down and a union puts in a claim for retrenchment benefits it must be subjected to the qualification period, and the employer can either entertain the claim and negotiate on the quantum or reject the claim outright on the ground that there is no such entitlement. Mr. Puthucheary on behalf of the union, however, argues that there is nothing in section 60G or for that matter in any provision of the Employment Ordinance to prohibit the Industrial Court from making the award for retrenchment benefits. Having regard to the preamble to the Industrial Relations Act, the court is entitled to make the award as it did subject only to the qualification imposed by section 60G that the benefits should not be given to employees who do not have the requisite qualification as to period of service. In this case, it is my view that both the provisions in the Employment Ordinance and the Industrial Relations Act ought to be read together. I do not agree that under section 60G there is no obligation on the part of an employer to pay retrenchment benefits. Since the section provides for qualification period for making retrenchment benefit, then it follows that those who qualify must have a legal right to such benefit.

Where such right exists, I do not think it is necessary for express words in the section to create obligation on the part of the employer to satisfy the legal right. Any other interpretation would render the section meaningless. In the alternative, there is no prohibition in section 60G or any other provisions in the Employment Ordinance for such payments to be made by an employer. Indeed, it is conceded by counsel for the company that in a claim for retrenchment benefit the company can either reject the claim outright or entertain it. From the pleadings before the Industrial Court, the company's refusal to meet the union's claim was not based on any absence of legal obligation on its part to make the payments, but solely on the ground that it was not in a financial position to do so. That being the case, I am of the view that the company should not now be heard to complain that the Industrial Court was acting in excess of jurisdiction in awarding the retrenchment benefits on the interpretation of section 60G. It is submitted that express words would be necessary if they were intended that the Industrial Court should have power to vary the application of any statutory provision, and that the general terms of section 26 and section 27(5) and (6) of the Industrial Relations Act No. 35 of 1967 do not suffice for this, and that the Industrial Court cannot override the provisions of statutory law. (Authorities cited are at pages 169 and 170 Industrial Disputes Law in Malaysia by *C. P. Mills*). But, in the present case, I do not think that the Industrial Court by making the award has overridden any provisions of statutory law. The Industrial Court is not prohibited by section 60G of the Employment Ordinance from settling disputes regarding retrenchment benefit, especially in the present case where on the pleadings the question of jurisdiction of the court to adjudicate had never been challenged until after the award was made. As stated in the preamble to the Industrial Relations Act 1967, the Act is to provide for the regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom. Under section 27(5), the court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form; and under sub-section (6), in making the award, the court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute. Thus, subject only to the qualification that it cannot override the provisions of statutory law, the Industrial Court has power in relation to a trade dispute referred to it by the Minister to make an award relating to all or any of the issues in dispute. In the instant case, the dispute is in respect of retrenchment benefits, and as stated earlier on, there is no statutory law which prohibits the Industrial Court from making an award on retrenchment benefits. The so-called restriction imposed by section 60G of the Employment Ordinance is in fact non-existent. The section merely prohibits the court from making such an award to labourers who have not been in continuous service with an employer for less than three years. To my mind, the Industrial Court is entitled to make an award for the settlement of any differences or disputes arising from the relationship between an employer and workmen and their trade unions, even if there is no express obligation on the part of the employer to make the payment as awarded, subject only to the qualification that such award is not prohibited by the provision of any statutory law. In the present case, however, I hold that the applicant is in fact under legal obligation to pay the retrenchment benefits as the claimants are entitled to such benefits under section 60G of the Employment Ordinance. As such, the award made is not wrong in law; and that for reasons already stated earlier on, the Industrial Court has not acted in excess of its jurisdiction in ordering that the claimants as per Schedule B of the award be paid retrenchment benefits.

In the event, I dismiss this motion with costs.

Motion dismissed.

Solicitors: *Ranjit, Thomas & Kula; Skrine & Co.*

KOK YOONG HEONG v. CHOONG THEAN SANG

[O.C.J. (Arulanandom J.) November 10, 1975]
[Penang — Originating Summons No. 83 of 1975]

Family Law — Custody of children — Welfare of children — Civil Law Act, 1956, s. 27 — Guardianship of Infants Act, 1961, ss. 5 and 11.

The applicant applied for the custody of her two children, aged 3 years and 2 years. The parties had been divorced and the children had been allowed to be in the custody of the respondent, their father, as he had stated to the applicant he was ill and did not have long to live and wanted to be with the children.

Held: considering all the circumstances of the case, it would be in the best interests of the welfare of the children for them to be in the custody of their mother the applicant, the father being given reasonable access to them.

Cases referred to:-

(1) *Re Satpal Singh, an infant* [1958] M.L.J. 283.
(2) *Helen Ho Quee Neo* v. *Lim Pui Heng* [1974] 2 M.L.J. 51.
(3) *Yong May Inn* v. *Sia Kuan Seng* [1971] 1 M.L.J. 280.

ORIGINATING SUMMONS.

Geh Cheng Lok for the applicant.

Goh Lim Eam for the respondent.

Arulanandom J.: In this case the applicant applied to court for an order that she be given the custody of two children *viz.* Choong Fook Choy and Choong Fook Keong born to her on June 21, 1972 and October 10, 1973 of her marriage to the respondent Choong Thean Sang on November 30, 1971.

Both the applicant and respondent are school teachers earning about the same salary. Diverse differences having arisen between the parties they separated about November 1974 and since then the two children are in the custody of the respondent who lives with his mother and sisters. Some time prior to the final breakdown of the marriage there was an incident in the family house when, while both parties